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Philip G. Davis
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Dear Phil:

Attached please find our analysis of the constitutionality of providing benefits for religious or spiritual health care as part of federal health care reform to provide universal access to health insurance in the U.S.

As noted in the analysis, there is considerable statutory precedent for this sort of accommodation of religious belief and practice and providing such benefits is fully consistent with the requirements of the Constitution's Establishment Clause and is an acceptable means of furthering the principles of the Free Exercise Clause.

If you have any questions, please feel free to call Charles Rothfeld at (202) 263-3233, who prepared the analysis, or me.

With best wishes,

Carolyn P. Osolinik

Carolyn P. Osolinik

Enclosure

THE CONSTITUTIONALITY OF BENEFITS FOR RELIGIOUS OR SPIRITUAL HEALTH CARE

Proposed health care legislation now pending in Congress would require all individuals to purchase health insurance. To help those who cannot afford insurance meet this obligation, the legislation would create health insurance "Gateways" that would act as clearinghouses for individual health insurance policies. Persons who fall below a certain income threshold would be eligible for federal health care credits, which they could then use to purchase health insurance through a Gateway.

As a means of assuring that health benefits are available through the proposed health care legislation to persons who, because of their religious beliefs, seek spiritual rather than medical or surgical care for illness, it has been proposed that the legislation include an antidiscrimination provision (described below as "the antidiscrimination rule"). The rule provides:

> For an individual entitled to medical or surgical care under a health insurance plan offered through a Gateway, it shall be unlawful for the Administrator of the Gateway or a health insurance plan in the Gateway to deny such individual benefits for religious or spiritual health care, provided that such religious or spiritual health care is an expense eligible for deduction as a medical care expense as determined by Internal Revenue Service Rulings interpreting Section 213(d) of the Internal Revenue Code as of January 1, 2009.

This provision would not offer a special entitlement to persons seeking religious or spiritual care. Instead, the rule would assure that, in circumstances where coverage of benefits for medical treatment is available to persons who do not have religious objections to medical care – and only in those circumstances – persons who seek spiritual care in lieu of medical treatment could not be denied spiritual care benefits that qualifies as "medical care" under Section 213(d) of the Internal Revenue Code.[1]

There is considerable statutory precedent for this sort of accommodation of religious belief and practice. As is explained below, providing such benefits is fully consistent with the requirements of the Constitution's Establishment Clause and is an acceptable means of furthering the principles of the Free Exercise Clause.

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[1] The IRS has interpreted Section 213(d) of the Internal Revenue Code as allowing deductions that are "confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness." The Service has applied this definition to include such things as payment for Christian Science practitioner services, Christian Science nursing care, and care received in religious nonmedical health care institutions. Rev. Rul. 2002-19, 2002-1 C.B. 778; Gen. Counsel Mem. 34714 (Dec. 16, 1971); Rev. Rul. 63-91, 1963-1 C.B. 54; Rev. Rul. 55-261, 1955-1 C.B. 307. In addition to covering Christian Science health care, Section 213(d) also applies to other religious health care practices undertaken for the purpose of treating or alleviating illness or disease. *See, e.g., TSO v. Comm'r*, 40 T.C.M. (CCH) 1277 (1980) (payments for Native American healing ceremonies).

A. The Antidiscrimination Rule Is Consistent With the Establishment Clause

The rules governing application of the Establishment Clause are not entirely settled, but as a general matter the Supreme Court takes into account three considerations when assessing the constitutionality of legislation said to provide support for a religious practice (the so-called *Lemon* test, after *Lemon v. Kurtzman*, 403 U.S. 602, 612-12 (1971): whether the legislation has a secular purpose, has the primary effect of neither advancing nor inhibiting religion, and does not foster excessive government entanglement with religion. See, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 222 (1997). None of these considerations calls into question the constitutionality of the antidiscrimination rule.

1. The Antidiscrimination Rule Has A Secular Purpose

To begin with, there can be no doubt that the anti-discrimination rule, although taking account of religious belief, has a secular purpose within the meaning of the *Lemon* principle. The goal of the provision is not to advance (or inhibit) religion; it is to obtain health benefits for persons who choose for religious reasons to pursue spiritual rather than medical or surgical treatment. This attempt to accommodate religious practice is itself a legitimate secular purpose: the Supreme Court "'has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted). *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

Indeed, in circumstances not dissimilar to those presented by the anti-discrimination rule, the Supreme Court has several times ruled that accommodation of religious practice is constitutionally *compelled* by the Free Exercise Clause. The Court has held, for example, that Sabbatarians may not be denied unemployment benefits because they refuse to work on their Sabbath. The contrary approach, the Court has explained, would require the believer "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free association of religion as would a fine imposed against [the believer] for her Sunday worship." *Sherbert v. Verner*, 374 U.S. 398, 399-400 (1963). That the denial was of government benefits that need not be made available to anyone as an initial matter was immaterial: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or service." *Id.* at 404. *See also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144-145 (1987).

And addressing legislation quite similar in both purpose and application to the antidiscrimination rule, the U.S. Court of Appeals for the Eighth Circuit upheld an amendment to the "Medicare and Medicaid Acts [that] enables individuals who hold religious objections to medical care to receive government assistance for care that they receive at [religious nonmedical health care institutions]." *Children's Healthcare is a Legal Duty, Inc. v. Min de Parle (CHILD)* 212 F.3d 1084 (8th Cir. 2000). The court of appeals held that "the accommodation of a special, government-created burden on religious behavior and practice constitutes a valid secular

purpose," explaining that the Medicaid/Medicare amendment "possesses a secular legislative purpose because it removes a special burden imposed by the Medicare and Medicaid Act upon persons who held religious objections to medical care." *Id.* at 1093. As in *Sherbert* – and in the current legislation – absent such an accommodation, persons with these views would be "forced to choose between adhering to their religious beliefs and foregoing all government health care benefits, or violating their religious convictions and receiving the medical care provided by Medicare and Medicaid." *Id.*

Even if accommodation (in the form of benefits for nonmedical care) is not constitutionally *required* under the Free Exercise Clause in such circumstances, "'[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'" *CHILD*, 212 F.3d at 1094 (citation omitted). To the contrary, there is "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Cutter*, 544 U.S. at 719. And where, as here, "widely available public benefits are of great importance to personal well-being," the burden imposed by a failure to make equivalent benefits available "is sufficient to permit congressional accommodation." *CHILD*, 544 U.S. at 1094.

At bottom, the constitutional requirement of a secular religious purpose "does not mean that the law's purpose must be unrelated to religion." Instead, this principle "aims at preventing the relevant governmental decisionmaker – in this case, Congress – from abandoning neutrality and acting with the intent of promoting a particular point of view on religious matters." *Amos*, 487 U.S. at 335. The antidiscrimination rule is wholly consistent with that principle; it "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment." *Cutter*, 544 U.S. at 724. It therefore satisfies the secular purpose requirement.

2. *The Antidiscrimination Rule Does Not Have The Primary Effect Of Advancing Religion*

The antidiscrimination rule also does not have the primary effect of advancing religion. To begin with, that the rule expressly refers to religion or has the effect of assisting some persons in engaging in religious activities is not decisive. The Supreme Court "has never indicated that statutes that gave special consideration to religious groups are *per se* invalid" (*Amos*, 483 U.S. at 338), and "[t]he Court has on numerous occasions upheld laws of religious accommodation that have expressly defined beneficiaries by reference to religion." *CHILD*, 212 F.3d at 1095. See, *e.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding "released time" program in which public school students are excused from school to attend religious instruction); *Amos*, 483 U.S. at 327, 330 (Federal Government may exempt secular nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment). These decisions indicate that a statutory accommodation of religion does not have a forbidden effect so long as it is "does not override other significant interests" of non-beneficiaries and "does not differentiate among bona fide faiths." *Cutter*, 544 U.S. at 723, 724. Under this understanding, "a religious accommodation impermissibly advances or inhibits religion only when it imposes a substantial burden on nonbeneficiaries ... or provides a benefit to religious believers without providing a

corresponding benefit to a large number of nonreligious groups or individuals. *CHILD*, 212 F.3d at 1095.

This principle is illustrated by decisions upholding government vouchers used to obtain state services, where the Supreme Court has "drawn a consistent distinction between government programs that provide aid directly to religious [institutions] ... and programs of true private choice, in which government aid reaches religious [institutions] only as a result of the genuine and independent choice of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Under this doctrine, the Court has upheld "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing." *Id.* at 649. *See id.* at 652. In such circumstances, the Court has "never found a program of true private choice to offend the Establishment Clause." *Id.* at 653.

That conclusion applies with full force to the antidiscrimination rule: funds would be directed to spiritual or religious health care "only as a result of the genuine and independent choice of private individuals" (*Zelman*, 536 U.S. at 649), and there would be "no 'financial incentive[s] that 'ske[w]' the program toward religious [care]." *Id.* The antidiscrimination rule likewise imposes no burden at all on nonbeneficiaries and would be part of a much larger program that, by definition, provides a corresponding benefit to a large number of nonreligious groups or individuals. *Cutter*, 544 U.S. at 723. And the program here would not put the government in the position of appearing to endorse religion, as only persons who already had opted for spiritual care would receive benefits for that purpose.

To be sure, the antidiscrimination rule would require that federal health care funds be used to pay directly for the insurance of spiritual or religious health care services, just as those funds would be used to pay for nonspiritual medical or surgical care. But when done as part of a broader and generally applicable program, in which the religious component has a secular purpose and precisely matches equivalent secular benefits that have the same goal, such expenditures do not have the primary effect of advancing religion.

There is considerable federal precedent for such a use of government resources. Most obviously, the Internal Revenue Code and associated IRS regulations permit the deduction of expenditures for spiritual and religious health care as "medical care" – even though such a deduction is precisely equivalent, in real terms, to the spiritual health care benefits that would be made available directly under the antidiscrimination rule. Such "tax expenditures " for the benefit of religious institutions have been upheld by the courts. *See, e.g., v. Tax Comm'n of City of New York*, 397 U. S. 664, 669 (1970).

And the Supreme Court has frequently made clear that governmental resources – when used as part of a generally applicable and nondiscriminatory program – may be used in a way that benefits religious programs. Student groups, for example, may use school facilities and resources for avowedly religious meetings when those facilities also are available to nonreligious student groups for secular purposes. *See Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *West Side Community Bd. Of Ed. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263

(1981); *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). By the same token, the use of government resources for an activity that has a religious aspect does not by itself render the program unconstitutional.

3. *The Antidiscrimination Rule Does Not Foster Excessive Government Entanglement With Religion*

Finally, the antidiscrimination rule does not run afoul of the *Lemon* entanglement principle. The Supreme Court has suggested that the entanglement inquiry may be conducted as a part of the "primary effect" consideration (*see Agostini*, 521 U.S. at 222); for the reasons already explained, the antidiscrimination rule does not have the primary effect of advancing religion. In any event, there can be no serious suggestion that the antidiscrimination rule would foster excessive entanglement. It does not require government supervision of religious activities. The proof is in the experience under the IRC provision permitting deduction for tax purposes of expenses for spiritual care undertaken to treat disease, which has not proved unmanageable.

B. The Antidiscrimination Rule Is Consistent With The First Amendment Rights Of Participating Insurers

In addition, the requirement that private insurers make spiritual health care benefits available if they wish to participate in the federal insurance program is not problematic under the Free Exercise Clause. The objection might be made that such insurers are effectively required to endorse spiritual care. But a recent Supreme Court decision forecloses that argument. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006), the Court upheld the Solomon Amendment, which provides that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution will lose specified federal funds. Certain law schools argued that the statute violated the First Amendment because it associated them with the military's "don't ask-don't tell" policy. The Supreme Court disagreed, holding that the Solomon Amendment affects only "what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60. The antidiscrimination rule is analogous; it requires only that insurers reimburse costs for spiritual care incurred by the insureds, not that insurers affirmatively endorse the value or efficacy of spiritual care. In effect, it provides simply that insurers offer an opportunity for patients to obtain spiritual care from third-party providers. There can be no serious suggestion that the rule obligates insurers to engage in activity to which *they* have religious objections.

Moreover, the doctrine that precludes the attachment of unconstitutional conditions to the receipt of government benefits applies only where the offending condition is viewpoint specific. Conditions on federal funding that are viewpoint neutral have been upheld, even though they may operate to marginally limit freedom of speech or association. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). And a universal condition that insurers participating in the federal health insurance program not discriminate against persons with religious objections to medical treatment is, by definition, content neutral. *See Rumsfeld*, 547 U.S. at 58.

In fact, a wide variety of federal statutes prohibit discrimination in programs that receive federal financial assistance. Among these provisions are Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the basis of race, color or national origin in "any program or activity receiving Federal financial assistance"; Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688, which prohibits discrimination on the basis of gender or blindness in education; and the Rehabilitation Act, 29 U.S.C. §§ 701-797, which prohibits discrimination on the basis of handicap in a variety of contexts. [2] Such conditions serve the Government's compelling interest in eliminating discrimination and ensuring that protected classes have access to important services, and therefore are constitutional even if they may in practice limit the aid recipient's free exercise rights. *See Bob Jones University v. United States* (461 U.S. 574) (1983) (holding that the Government had a compelling interest in eliminating racial discrimination and, therefore, could deny the university tax-exempt status because it denied admission to students in inter-racial marriages, even though the school's policy was grounded in sincerely held religious beliefs). That rule applies here.

For additional information on the constitutional analysis, please contact:

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[2] Title VI, 42 U.S.C. § 2000d; *see also* 10 CFR 1040.1 (Department of Energy); 23 C.F.R. Part 200 (2002) (Federal Highway Administration); 28 C.F.R. Part 42 (Department of Justice); 34 C.F.R. Part 100 (Department of Education); 40 C.F.R. Part 7 (Environmental Protection Agency); 32 C.F.R. 195.1 (Department of Defense); 49 C.F.R. 21.1 (2002).(Department of Transportation).